

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEXTERA ENERGY OPERATING SERVICES, )	)	
LLC, )	)	
Petitioner, )	)	
	)	
and )	)	
	)	Case 33-UC-00181
	)	
INTERNATIONAL UNION OF OPERATING )	)	
ENGINEERS, AFL-CIO, LOCAL 150, )	)	
	)	
Respondent. )	)	

**RESPONSE IN OPPOSITION TO  
EMPLOYER’S REQUEST FOR REVIEW**

International Union of Operating Engineers, AFL-CIO, Local 150 (“Local 150” or “Union”), hereby submits this Response in Opposition to the Request for Review filed by NextEra Energy Operating Services, LLC (“NextEra” or “Employer”).

**I. FACTUAL BACKGROUND**

On May 10, 2011, Local 150 filed a Representation Petition seeking representation of site technicians, central maintenance technicians, and the parts/procurement employee working at the Employer’s Shabbona, Illinois wind farm (Transcript of Proceedings [“Tr.”] 7). The Petition excluded managers, high voltage technicians, clerical employees, any employees not in the unit description, guards and any other personnel not permitted under the Act. The Employer challenged the appropriateness of that unit. Matt Hoffman is the only business services technician at the Shabbona facility (*see* Tr. 81).

On May 19, 2011, the Employer stipulated with Local 150 to the following unit (emphasis added):

All full-time and regular part-time site technicians, central maintenance technicians, **business services technicians**, and high voltage technicians

employed by the Employer at its Shabbona, Illinois facility, excluding all other employees, managers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

That stipulation was contained in a Board Stipulated Election Agreement (Union Exhibit 7 (hereinafter “Un. Ex.”)). On May 26, 2011, the Employer produced an *Excelsior* list (Un. Ex. 6). That list included Matthew Hoffman, who the Employer has identified as a business services technician (Un. Ex. 6). Prior to the conduct of the election, Hoffman expressed support for the Union (Tr. 96). On June 16, 2011, the Board conducted an election which the Union won 8 votes to 3 votes. Hoffman voted for the Union (Tr. 96). On June 24, 2011, the Board certified Local 150 as the Certified Representative of the bargaining unit that included business services technicians (Tr. 7).

On July 6, 2011, the Employer filed a unit clarification petition (“UC Petition”) seeking to expressly *exclude* (emphasis added): “All other employees, managers, office clerical employees, **business services technicians**, professional employees, confidential employees, guards and supervisors as defined in the Act.” On September 19, 2011, the Union filed a Motion to Quash the Notice of Hearing, citing various grounds including the Board relitigation rule (Tr. 8).

On September 20, 2011, the Regional Director conducted a hearing regarding the Employer’s UC Petition (Tr. 1). At the conclusion of the hearing, the Employer stated “Our final position is that the evidence adduced at hearing today demonstrates that Mr. Hoffman is an office clerical employee and should be excluded from the unit” (Tr. 144). At the same time, the Employer stipulated that it is not seeking to exclude the business services technician from the unit, and that Hoffman is a business services technician (Tr. 81). The parties stipulated that the unit at issue is a newly certified unit with no previous history of bargaining (Tr. 11-12). On

October, 2011, the Union filed a Motion to Strike, objecting to the Employer's use of parole evidence to undermine the stipulated election agreement.

On November 18, 2011, the Regional Director issued his Decision and Order dismissing the Petition ("Decision"). In that Decision, the Regional Director found that the stipulated election agreement was clear and unambiguous (Decision at 2). He further determined that the business services technician position is not an office clerical position (Decision at 2-3). On December 2, 2011, the Employer filed this Request for Review of the Regional Director's Decision.

## **II. THE REGIONAL DIRECTOR CORRECTLY FOUND THE ELECTION AGREEMENT UNAMBIGUOUS.**

According to the *NLRB Rules and Regulations*, Section 102.67(c), "[t]he Board will grant a request for review only where compelling reasons exist therefor." Those reasons are:

- (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.
- (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

The Employer has not furnished appropriate grounds for its request for review, because the Regional Director correctly determined that the Employer's Unit Clarification petition should be dismissed.

First, the Regional Director correctly determined that the Employer's UC Petition could not be granted because the Employer was attempting to dismantle an unambiguous stipulated election agreement. In *Union Electric Co.*, 217 NLRB 666, 667 (1975), the Board identified the purpose of unit clarification proceedings:

Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category—excluded or included—that they occupied in the past. **Clarification is not appropriate, however, for upsetting an agreement of a union and employer...even if the agreement was entered into by one of the parties for what it claims to be mistaken<sup>1</sup> reasons ...**

Indeed, the Board has a “relitigation rule” that precludes a party from stipulating to the inclusion of a classification in a representation case and shortly thereafter seeking to exclude<sup>2</sup> the position from the unit. National Labor Relations Board, *Representation Case Outline of Law*, §11-200 (John Higgins ed., 2007); *Premier Living Center*, 331 NLRB 123 (2000); *I.O.O.F. Home of Ohio, Inc.*, 322 NLRB 921 (1997). It follows that an unambiguous stipulated election agreement is not subject to collateral attack through a UC Petition. *Laidlaw Transit*, 322 NLRB 166 (1997); *Gala Food Processing*, 310 NLRB 1193 (1993).

The Regional Director correctly concluded that in this case, the stipulated election agreement is unambiguous. A unit description is facially ambiguous when it does not make explicit reference to the disputed job classification. *Caesar’s Tahoe*, 337 NLRB 1096, 1097-1099 (2002) (stipulation ambiguous where “Engineering Coordinator” classification not included in unit description); *Extencicare Health Services, Inc.*, 347 NLRB 544, 546-547 (2006) (stipulation ambiguous where “supply clerk” classification was not expressly included in unit). In other words, if the disputed job title is included in the unit description, the stipulated unit is not ambiguous. In this case, it is undisputed that the job classification involved is expressly identified in the stipulated election agreement (Un. Ex. 7). That is, the Employer stipulated to the

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<sup>1</sup> The Board does not excuse parties from knowledge of the law because of an alleged mistake, even if that mistake was based upon something the Board Agent said. *E.g.*, *Poultry Enterprises*, 102 NLRB 211 (1953).

<sup>2</sup> The Employer tried to deny that it was trying to exclude the business services technician position. However, that is explicitly what the Employer requested in its UC Petition.

express inclusion of the “business services technician” position in the bargaining unit description in the parties’ stipulated election agreement (Un. Ex. 7). Because the “business services technician” position is expressly included in the unit, the Regional Director correctly concluded that the agreement was unambiguous. In its Request for Review, the Employer claims that the agreement is ambiguous because the business services technician position *is* an office clerical, and office clericals are excluded from the unit<sup>3</sup> (Un. Ex. 7). However, such an argument is moot – to the extent that it is even supported by law - because the Regional Director also correctly found that the business services technician position is not an office clerical, as will be addressed further below.

The Regional Director’s Decision is also consistent with the rules of contract interpretation. Where a contract contains general and specific provisions that relate to the same subject matter and nonetheless conflict, courts will enforce the specific provision. *See Lippo v. Mobil Oil Corp.*, 776 F.2d 706, 713 (7th Cir. 1985); *Owensboro v. Owensboro Waterworks Co.*, 243 U.S. 166, 184 (1917) (specific provisions should always control general provisions in a contract where they conflict). In this case, the parties’ stipulated election agreement approved by the Regional Director specifically includes the business services technician classification. It is uncontested that Matt Hoffman is the sole employee in that classification (Tr. 81).

Even assuming his duties could be said to encompass those of an “office clerical,” that general term is superseded by the specific Employer classification included in the unit: the “business services technician.” Moreover, contracts should be interpreted to reduce the risk of forfeiture. *Navarro v. FDIC*, 371 F.3d 979 (7th Cir. 2004). Here, the parties negotiated an election stipulation designed to create a wall-to-wall bargaining unit. Interpreting that stipulation

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<sup>3</sup> The Employer further stipulated that it was not seeking to exclude the business services technician position from the unit, although that is precisely the effect that its UC Petition would have (Tr. 81). Given such a stipulation, the Regional Director had still further grounds to dismiss the Employer’s petition.

to exclude Hoffman results in a forfeiture of the Union's sought after wall-to-wall unit, and defeats his rights to representation under Section 7 of the Act.<sup>4</sup> Because the Regional Director's Decision is consistent with the rules of contract interpretation, the Employer cannot discharge its burden to show that the Decision raises a substantial question of law or policy.

### **III. THE REGIONAL DIRECTOR CORRECTLY DETERMINED THAT THE BUSINESS SERVICES TECHNICIAN IS NOT AN OFFICE CLERICAL.**

“Generally, plant clericals are included in a production and maintenance unit while office clerical employees are excluded.” National Labor Relations Board, *Representation Case Outline of Law*, §19-400 (John Higgins ed., 2007). “Plant clericals” are distinct from “office clericals” in that “plant clericals” have principal functions and duties relating to the production process and/or the employer's daily operations. *Extendicare Health Services, Inc.*, 347 NLRB 544, 547 (2006); *Gordonsville Industries, Inc.*, 252 NLRB 563, 590 (1980); *Fisher Controls Co.*, 192 NLRB 514 (1971). These distinctions are grounded in community of interest principles. *Cook Composites & Polymers Co.*, 313 NLRB 1105, 1108 (1994).

Typical plant clerical duties are timecard collection, transcription of sales orders to forms to facilitate production, maintenance of inventories, and ordering supplies. *Kroger Co.*, 342 NLRB 202 (2004); *Caesar's Tahoe*, 337 NLRB 1096 (2002); *Hamilton Halter Co.*, 270 NLRB 331 (1984). In contrast, typical office clerical duties are billing, payroll, phone duties, and mail. *PECO Energy Co.*, 322 NLRB 1074 (1997); *Mitchellace, Inc.*, 314 NLRB 536 (1994); *Virginia Mfg. Co.*, 311 NLRB 992 (1993); *Dunham's Athleisure Corp.*, 311 NLRB 175 (1993). The use of a computer may indicate that the employee is a plant clerical if the production employees also

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<sup>4</sup> As the Employer concedes, Hoffman will be a single employee unit if he is excluded.

utilize computers.<sup>5</sup> See *Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings*, Section II (L)(2), 104-105 (Sept. 1993).

In this case, the hearing evidence supports the determination that the business services technician is not an “office clerical,” and does indeed share a community of interest with the other bargaining unit members. As the Regional Director noted, the business services technician position was previously identified by the Company as a “plant technical” (Decision at 7). All employees, including undisputed bargaining unit members and Hoffman, wear the same clothing, work the same hours, participate in the same employee benefit programs, work together on the Employer problem-solving program, perform safety evaluations of one another, and together participate in morning meetings, the completion of the morning “tailboard,” and stretching exercises (Decision at 3-5). All employees, including wind and central maintenance technicians, use laptop computers (Tr. 27, 73-74, 76-77).

Throughout the day, the business services technician has regular contact with the other members of the bargaining unit (Decision at 5). Like the wind technicians, Hoffman visits turbines and has been taught to climb towers and administer CPR (Decision at 4-5). He performs some of the same work as the wind and central maintenance technicians, such as resetting turbines and using the Employer’s lockout/tagout procedures (Decision at 5). On a regular basis, the wind and central maintenance technicians also perform the same duties as those required of the business service technician (Tr. 20-21, 22, 24, 26-27, 29, 34, 35, 36, 38, 42, 43, 58-59, 63-64, 96-98, 99, 102, 104, 106-107, 108-109, 110, 115-116, 121-122). The wind and central maintenance technicians must learn parts of his job to be promoted (Decision at 5).

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<sup>5</sup> The *Guide* states: “Does the employer have a computerized information processing system? Do the employees make entries into and obtain information from this system? Do production employees also utilize this system?”

All of the business services technician's duties are consistent with Board precedent regarding plant clericals: for example, he maintains inventories, orders parts and supplies, and and virtually every other task he performs serves as some sort of production support<sup>6</sup> role (Tr. 20, 23-24, 34, 36, 42, 58-59, 74-75, 78-79, 96-97, 98, 99, 100, 101, 102-103, 105-106, 107-108, 109-110, 112, 115-116, 121, 122-123). The business services technician performs no duties consistent with an office clerical, such as payroll, billing, faxes, correspondence, making coffee, answering phones, or taking dictation (Tr. 104-105, 125-126, 129-130, 134-135). Accordingly, the Regional Director correctly determined that the business services technician is not an office clerical employee, and more in the nature of a plant clerical. Consequently, the Employer has not sustained its burden to show that the Regional Director's Decision is "clearly erroneous."

#### **IV. THE EMPLOYER'S REQUEST FOR REVIEW IS UNSUPPORTED BY LAW AND THE RECORD.**

In part one of its Request for Review, the Employer asserts that it is entitled to utilize a unit clarification petition to challenge the inclusion of the business services technician in the unit (Request for Review at 2). The Employer cites *Kirkhill Rubber Co.*, 306 NLRB 559 (1992) for this proposition. What the Employer fails to mention is that *Kirkhill* involved an ambiguous stipulated election agreement, and requires that the Employer attempt to negotiate with the Union prior to the filing of a UC Petition.<sup>7</sup> *Kirkhill* at 559, 560 at fn. 4. Since neither of those facts is present here, *Kirkhill* is inapplicable. Therefore, that case does not demonstrate that the Regional Director's Decision is a departure from Board precedent.

The other case cited by the Employer also clearly supports the Regional Director. In *Business Records Corp.*, 300 NLRB 708 (1990), the Board found that an agreement that

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<sup>6</sup> The Employer's own documents describe the business services technician position as a "support" role (Er. Ex. 1 at 10; Er. Ex. 2 at 5).

<sup>7</sup> The Employer in fact quotes from the sentence where this requirement is contained, but carefully omits it (Request for Review at 2).

specifically identifies one job classification and excludes another group is “unambiguous.” *Business Records* at 708. In that case, the employee’s job classification was in dispute,<sup>8</sup> and that is not the case here. After concluding that the evidence was insufficient to show that the employee belonged in the excluded group, the Board determined that the individual was in the unit. *Id.* In this case, the Regional Director concluded that the business services technician position is not an office clerical position, and found the business services technician to be in the unit. Thus, to the extent that case is comparable to this one, the outcome supports the determination of the Regional Director.

The Employer further claims that it is entitled to mount a collateral attack on the stipulated election agreement because it relied on the Board Agent’s statement that it could “challenge” the business services technician post-election (Request for Review at 3). It is well-known that (National Labor Relations Board, *An Outline of Law and Procedure in Representation Cases and 10(k) Proceedings*, §§ 22-111, 22-121 (John Higgins, ed. 2008)):

Generally postelection challenges are not permitted. The exception is where the party knows of the ineligibility, suppressed the facts, and would otherwise benefit from its actions. See *Lakewood Engineering & Mfg.*, supra; *Solvent Services*, supra; and *Atlantic Industrial Constructors, Inc.*, 324 NLRB 355 (1997)... Where an election is conducted pursuant to a stipulation... of election, the Regional Director issues the certification where no objections are filed and challenges are not determinative of the results.

In other words, the Board’s published rules indicate that a party cannot make a challenge after an election, and a challenge does not require a hearing unless the challenges are determinative. For that reason, the Employer had notice that its stipulation to the inclusion of the business services technician might mean that it would be permanently foreclosed from challenging that position.

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<sup>8</sup> The Employer in that case had “inspectors,” and people who worked in the “technical shop.” *Id.* A person was either in one group or the other, whereas the Employer asserts here that the business services technician is in two categories.

As noted earlier, the Board has historically taken the position that a party cannot use “mistake” to undermine a stipulated election agreement, nor does reliance on a Board Agent’s statement excuse a party’s ignorance of the law. In that regard, the Employer’s reliance on *Navtar Corp.*, 109 NLRB 1278 (1954) and *Carolina Power & Light*, 119 NLRB No. 177 (1958) is misplaced (Request for Review at 4). Neither of those cases create license for parties to deviate from the terms of an unambiguous stipulated election agreement on the grounds that the party entertained some subjective understanding not contained in the agreement itself. Therefore, the Employer cannot establish that the Regional Director’s refusal to consider the Employer’s “mistake” represents a departure from Board precedent or policy.

The Employer argues that the failure to give it a “pass” based on the Board Agent’s alleged statements will undermine confidence in the Board (Request for Review at 4-5). As a result, a party “is entitled to insist that the Board and all parties adhere to provisions of the election stipulation that are designed to ensure a fair election.” *Summa Corp. v. NLRB*, 625 F.2d 293, 296 (9th Cir. 1980). That is because “it would be manifestly unfair to allow the Board to obtain all the procedural advantages that flow from gaining the other parties’ consent yet to excuse it from living up to its part of the bargain.” *National Labor Relations Board v. Granite State Minerals, Inc.*, 674 F.2d 101 (1st Cir. 1982). As these cases recognize, it is the remedy sought by the Employer that will undermine confidence in the Board.

Furthermore, any evidence supporting such an argument is irrelevant. Where the stipulated election agreement is clear and unambiguous, pre-election conduct is extrinsic evidence and cannot be considered in a determination about the terms of the agreement.<sup>9</sup> *Caesar’s Tahoe*, 337 NLRB 1096, 1099-1100 (2002) at 1099-1100. In this case, the Regional Director determined that the stipulated election agreement was unambiguous, a conclusion that

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<sup>9</sup> For the same reason, whether the Union challenged another employee at the election is irrelevant.

the Employer's case law supports. That made the Employer's attempt to introduce hearsay evidence regarding the Board Agent's statements inadmissible, in addition to the negative inference presented by the Employer's failure to call the Board Agent as a witness. Consequently, contrary to the Employer's claims, the Regional Director properly indicated his refusal to consider such evidence.

The Employer further claims that the Regional Director ignored or "fail[ed] to acknowledge" undisputed evidence that would establish that the business services technician position is an office clerical (Request for Review at 5). On the contrary, the Decision itself expressly "acknowledges" most of the facts that the Employer claims are pivotal in its case (*cf.* Decision at 4; Request for Review at 5-6). Moreover, some of these "undisputed" facts *were* disputed. For example, the Employer claims that the only training that business services technicians receive is "business processes and procedures" (Request for Review at 6, citing Transcript page 36). However, the Transcript does not say that, and the Union introduced evidence that Hoffman received additional training (Decision at 4-5; Tr. 125). Therefore, the Employer's claims that certain facts are "undisputed" is not worthy of credence, just as its claim that the Regional Director "ignored" evidence is contradicted by the Regional Director's Decision.

The Employer identifies these facts, and then cites to several cases for the apparent proposition that anyone who spends most of his or her time in an office must be an office clerical (Request for Review at 7). Those cases do not stand for such a simplistic and sweeping proposition. Additionally, none of those cases are really similar on the facts to the case presented to the Regional Director. In each case, the amount of contact with production or maintenance employees was minimal, the duties of the individuals were rather stereotypical clerical duties,

there was little or no overlap between the duties of the disputed individuals and plant or maintenance employees, or the employees involved otherwise had insufficient community of interest with the production employee unit. That is simply not the case here, and thus, those cases do not demonstrate that the Regional Director indulged in a departure from Board precedent. The Employer has not sustained its burden.

**V. CONCLUSION**

For all of the foregoing reasons, the Union moves the Board to deny the Employer's Request for Review.

Dated: December 8, 2011

Respectfully submitted,

INTERNATIONAL UNION OF OPERATING ENGINEERS,  
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By: /s/Elizabeth A. LaRose

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## CERTIFICATE OF SERVICE

The undersigned, an attorney of record, hereby certifies that on December 8, 2011, she electronically filed the foregoing with the National Labor Relations Board e-file system:

*And also sent a copy via electronic mail to the following individuals:*

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